Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

LOGAN T. JOHNSTON, III,
Cross-Petitioner,

v.

MELVIN STERNBERG,
STERNBERG & SINGER, LTD.,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

RONALD J. ELLETT
ELLETT LAW OFFICES
2999 North 44th Street
Phoenix, AZ 85018
(602) 235-9510

DEEPAK GUPTA
Counsel of Record
ADINA H. ROSENBAUM
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
dgupta@citizen.org

Counsel for Cross-Petitioner

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QUESTION PRESENTED

A person injured by a willful violation of the automatic stay in a bankruptcy proceeding is entitled to "recover actual damages, including costs and attorneys' fees." 11 U.S.C. § 362(k)(1). Does the statute authorize recovery of the attorneys' fees incurred in prosecuting the section 362(k)(1) damages action?

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INTRODUCTION

The automatic stay, which is triggered immediately upon the filing of every bankruptcy petition, is a crucial component of the Bankruptcy Code. By safeguarding bankruptcy courts' exclusive jurisdiction, the stay prevents one creditor from gaining an unfair advantage over others. When a bankruptcy estate is injured by a creditor's willful violation of the automatic stay, the Code authorizes the estate to "recover actual damages, including costs and attorneys' fees," incurred as a result of the stay violation. 11 U.S.C. § 362(k)(1).

In the decision below, the Ninth Circuit held that section 362(k) does not authorize the recovery of attorneys' fees incurred in prosecuting the damages action itself. That holding breaks with the overwhelming consensus of courts and commentators, departs from the Ninth Circuit's own prior precedent, and creates an acknowledged split with the Fifth Circuit.

Already, courts have begun to "question the policy analysis underlying that decision." *In re Bertuccio*, 2009 WL 3380605, at *7 n.7 (Bankr. N.D. Cal. 2009). As one bankruptcy court observed, the Ninth Circuit's decision "weakens substantially the effectiveness of the automatic stay. What good is it to be entitled to damages and attorneys' fees for violation of the automatic stay if it costs a debtor much more in unrecoverable attorneys' fees to recover such damages and recoverable attorneys' fees?" *Id.* The decision will inevitably reward overreaching by unscrupulous creditors, disadvantage innocent creditorse, and introduce significant uncertainty into the bankruptcy system nationwide.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 595 F.3d 937. The orders of the district court and bankruptcy court (Pet. App. 25-96) are unreported.[1]

JURISDICTION

The court of appeals entered its second amended opinion on February 8, 2010. The petition for a writ of certiorari in *Sternberg v. Johnston*, No. 09-1374, was filed on May 10, 2010, and placed on this Court's docket on May 12, 2010. This conditional cross-petition is filed pursuant to Supreme Court Rule 12.5. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 362(k) provides:

(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

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[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari in *Sternberg v. Johnston*, No. 09-1374.

STATEMENT

A. Statutory Framework

Through the Bankruptcy Reform Act of 1978, Pub. L. No. 95-958, 92 Stat. 2549 (1979), *codified at* 11 U.S.C § 101, et seq., Congress created a comprehensive legal regime designed to ensure that "all creditors are treated equally" and to facilitate an efficient process that minimizes the "deterioration of the estate in the course of liquidation." H.R. Rep. 95-595, 340, 45 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6297, 6006. To that end, Congress granted bankruptcy courts "broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases." *Id.* at 48.

The principal mechanism for protecting that "broad and complete" jurisdiction is the automatic stay, which is triggered by the filing of a bankruptcy petition. The stay prohibits creditors from taking action—judicial, administrative, or otherwise—to recover or collect from a debtor in bankruptcy. 11 U.S.C. § 362(a). Congress intended the automatic stay to prevent creditors from "acting unilaterally to gain an advantage over other creditors" and "obtain[ing] payment of [their own] claims in preference to and to the detriment of other" valid claims against the debtor. H.R. Rep. 95-595, at 220, 340.

As originally enacted, the Bankruptcy Code granted bankruptcy courts the power to hold creditors that violated the automatic stay in civil contempt. Where courts did not consider contempt sanctions appropriate, the costs and fees incurred in enforcing the stay were allowable administrative expenses of the estate, *see* 11 U.S.C. §§ 330(a)(1), 503(b)(2), and thus treated as first-priority claims against the debtor's estate. *See id.* § 507(a)(1)(C). Because the value of a debtor's estate is finite, such ad-

ministrative expenses effectively decreased the amount recovered by unsecured creditors upon the disposition or liquidation of the estate.

In 1984, Congress amended the Bankruptcy Code to provide that:

> an individual injured by any willful violation of a stay provided by [section 362(a)] shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 304, 98 Stat. 333 (1984) (originally codified at 11 U.S.C. § 362(h)). This provision was reenacted in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 § 305(1)(B), (C), 119 Stat. 23 (2005), and recodified as 11 U.S.C. § 362(k)(1).

When a creditor responsible for a violation of the automatic stay does not voluntarily cure resulting losses, section 362(k) authorizes the debtor estate to initiate an action for damages before the bankruptcy court. To the extent that the resulting award reimburses the estate for losses incurred, including attorneys' fees, section 362(k) insulates innocent secured and unsecured creditors from the costs of the stay violation.

B. Facts and Proceedings Below

Logan Johnston and Paula Parker divorced in 1996. As part of their divorce settlement, Johnston was ordered to make spousal-maintenance payments to Parker. In January 2001, Parker's attorney, Melvin Sternberg, asked an Arizona state court to hold Johnston in contempt for non-payment. Pet. App. 4.

Johnston filed a Chapter 11 petition for bankruptcy on May 14, 2001, triggering the automatic stay, pursuant to 11 U.S.C. § 362(a), of all creditor collection actions outside the bankruptcy forum. Three days later, on May 17, Johnston's bankruptcy attorney notified Johnston's creditors of the petition. That same day, at a state-court hearing on Parker's contempt request, Johnston informed the state court, Parker, and Sternberg of the petition and asked the state court to stay any action against him to the extent that it would interfere with the bankruptcy proceedings. *Id.* at 4-5.

Despite the automatic stay, Sternberg urged the state court to move forward with the contempt proceedings against Johnston. *Id.* at 5. On July 13, the state court issued a minute order holding Johnston in contempt and awarding damages to Parker. The order required Johnston to "pay the judgment by August 1, 2001," or be jailed "until the full amount is paid." *Id.*

Johnston immediately sought relief from the order. He filed a motion for a stay in the state court and wrote to Sternberg requesting that he "take appropriate remedial measures to cure [his] violation" of the automatic stay. *Id.* at 6 (brackets in original). Sternberg took no such action. *Id.*

Because his motion in the state court would not be heard until after the August 1 deadline, Johnston filed a petition asking the Arizona Court of Appeals to stay and vacate the contempt order. Instead of complying with his affirmative obligation under the Bankruptcy Code to cure the stay violation, Sternberg actively pursued the award against Johnston. On Parker's behalf, Sternberg filed and defended a brief opposing Johnston's motion and asked that the contempt order be upheld and enforced. *Id.*

In the meantime, Johnston turned to the bankruptcy court for relief. On July 23, he filed a complaint seeking (1) vacatur of the state-court order and (2) damages incurred as a result of Sternberg's perpetuation of the stay violation, "including attorney's fees necessary to bring this complaint and the motions related to the complaint." Doc. No. 1 at 2, *In re Johnston*, No. B-01-06221 (Bankr. D. Ariz. July 23, 2001).

With respect to the first request, the bankruptcy court concluded that the automatic stay had been violated and vacated the state-court order. Pet. App. 6. With respect to liability for damages, the district court held that both Parker and Sternberg had an affirmative obligation to cure the stay violation. On remand, the bankruptcy court held that Sternberg's perpetuation of the state-court order in spite of that duty constituted a willful violation of the automatic stay. *Id.* at 8.

Before the bankruptcy court issued an award of damages, Johnston and Parker settled, leaving only Sternberg as a defendant. *Id.* After a "painstaking" accounting of Johnston's injuries, *id.* at 31, the court ordered an award of damages in the amount of $92,869.20, including $2,883.20 in lost wages, $20,000 in emotional distress damages, and $69,986 in attorneys' fees, which included fees incurred for prosecuting the adversary proceeding. *Id.* at 8-9.

Sternberg appealed the damages award to the district court, requiring Johnston to incur additional attorneys' fees to defend the award. The district court affirmed, and Sternberg appealed to the Ninth Circuit. *Id.* at 31.

C. The Ninth Circuit's Decision

The Ninth Circuit affirmed in part and reversed in part. After concluding that Sternberg had willfully violated the automatic stay, the court considered the award of attorneys' fees. The court narrowly interpreted section 362(k) to conform to its view of the policy objectives behind the automatic stay and disallowed all of the attorneys' fees incurred in the damages action. *Id.* at 15-24.

Observing that Congress intended "without a doubt" to allow recovery of fees for "work associated with remedying the stay violation," the court found it "less clear" whether Congress intended the same treatment for fees incurred in attempting "to collect damages for the stay violation." *Id.* at 16-18.

The court first rejected the view of its own Bankruptcy Appellate Panel, which had viewed "'actual damages' as requiring an award that returns a debtor to the position he was in before the stay violation occurred." *Id.* at 19. Instead, the court reasoned that the term "actual damages" encompasses only compensation for "the injury resulting from the stay violation itself." *Id.* at 20. Any fees incurred after "the violation has ended," the court reasoned, would not be compensable. *Id.*

The court based its "narrower understanding" of the statute on its view of the "context and goals of the automatic stay." *Id.* The court stated that it would "further neither the financial nor non-financial goals of the automatic stay" to reimburse Johnston for the fees he incurred to recover the actual losses that resulted from Sternberg's violation. *Id.* at 21-22. In particular, the court believed that allowing such fees would impermissibly "aid the debtor in pursuing his creditors," and lead to "[m]ore litigation." *Id.* at 21-22. Although it did "not cre-

ate a circuit split lightly," the Ninth Circuit recognized that the Fifth Circuit had reached a directly contrary holding in *In re Repine*, 536 F.3d 512, 522 (5th Cir. 2008). *Id.* at 23.

Johnston petitioned for rehearing and rehearing en banc. The Ninth Circuit denied the petition. Pet. App. 2.

REASONS FOR GRANTING THE WRIT

I. The Courts are Divided Over What Attorneys' Fees May Be Recovered Where Injury Results From a Willful Violation of the Automatic Stay.

The decision below concludes that 11 U.S.C. § 362(k) does not permit an award of attorneys' fees incurred in an adversarial proceeding to recover damages resulting from a willful violation of the automatic stay. As the Ninth Circuit recognized, its decision is squarely in conflict with a decision of the Fifth Circuit. It is also inconsistent with decisions awarding attorneys' fees and affirming such awards in eight other circuits.

First, the Fifth Circuit has rejected precisely the theory adopted by the Ninth Circuit below. In *In re Repine*, 536 F.3d 512, 522 (5th Cir. 2008), that court affirmed a damages award—including attorneys' fees incurred in the prosecution of the damages action. *Repine* relied on two bankruptcy decisions, *Mitchell v. BankIllinois*, 316 B.R. 891, 901-04 (Bankr. S.D. Tex. 2004), and *In re Still*, 117 B.R. 251, 254-55 (Bankr. E.D. Tex. 1990). *Mitchell* had held that "fees and costs experienced by the injured party" in a damages action "[were] part of the damages resulting directly from the stay violation," 316 B.R. at 904 (citation omitted), while *Still* had held that such fees would be recoverable expenses "so long as" the damages action also sought to recover damages beyond the fees

incurred in the action itself. *Repine*, 536 F.3d at 522. Adopting these readings of section 362(k), the Fifth Circuit concluded that "it is proper to award attorney's fees that were incurred prosecuting a section 362(k) claim." *Id.* at 522.

Consistent with the Fifth Circuit's approach, the Seventh and Tenth Circuits have expressly affirmed damages awards that include attorneys fees incurred in pursuit of section 362(k) damages.[2] As the Seventh Circuit explained, such attorneys' fees were appropriately included in the damages award because, had there been no stay violation, there "would have been no need to expend the attorneys' fees and costs." *In re Price*, 42 F.3d 1068, 1074 (7th Cir. 1994).

Likewise, all three Bankruptcy Appellate Panels to consider the matter—in the First, Sixth and Ninth Circuits—have determined that, where a damages action is necessary to vindicate a debtor's rights under the Bankruptcy Code, section 362(k) authorizes fees incurred in connection with that action to "make the injured party ... whole." *In re Walsh*, 219 B.R. 873, 878 (B.A.P. 9th Cir. 1998); *see also In re Roman*, 283 B.R. 1, 10 (B.A.P. 9th Cir. 2002) (debtor is entitled to fees for an adversary proceeding where violator's action forced debtor into court to recover losses); *In re Sharon*, 234 B.R. 676, 688 (B.A.P. 6th Cir. 1999) (same); *In re Carrigg*, 216 B.R. 303, 306 (B.A.P. 1st Cir. 1998) (same). And bankruptcy

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[2] *See In re Johnson*, 575 F.3d 1079, 1081-82 (10th Cir. 2009); *In re Price*, 42 F.3d 1068, 1074 (7th Cir. 1994). The Ninth Circuit itself has affirmed awards including fees incurred in pursuing damages. *See In re Dawson*, 390 F.3d 1139, 1152-53 (9th Cir. 2004); *In re Pace*, 67 F.3d 187, 192 (9th Cir. 1995).

courts within the Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits have awarded fees incurred in damages actions under section 362(k).[3]

Finally, the Ninth Circuit's holding on attorneys' fees is in conflict with the consensus view among bankruptcy scholars and commentators. Before the Ninth Circuit's decision, section 362(k) was uniformly understood to allow recovery of "fees and costs incurred in preparing and prosecuting the § 362(k) motion." Kathleen P. March & Hon. Alan M. Ahart, *Rutter Group Practice Guide: Bankruptcy* § 8:896 (2008).[4] Indeed, in discussing the availability of attorneys' fees under section 362(k), the leading bankruptcy treatises make no distinction between fees incurred to enforce the stay and fees incurred to recover damages resulting from a stay violation. *See, e.g.*, 3 *Collier On Bankruptcy* ¶ 362.11[3] at 362-124 to 362-126.1 (15th ed. rev. 2004); 2 Hon. William L. Norton, Jr., *Norton Bankruptcy Law and Practice* § 43:57 at 43-118 to 43 121 (2010); 1 Robert E. Ginsberg, *Bankruptcy* ¶ 3002 (1985); *Bankruptcy Litigation Manual* 5-72 to 5-75 (1993); 2 Benjamin Weintraub & Alan N. Resnick, *Bankruptcy Law Manual* ¶ 1.09[10] at 1-50 (1986); 2 Benjamin Weintraub & Alan N. Resnick, *Bankruptcy Law Manual* ¶ 1.09[10] at 1-64 (3d ed. 1992); Richard I.

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[3] *See, e.g., Mitchell*, 316 B.R. at 901-04; *In re Will*, 303 B.R. 357, 367 (Bankr. N.D. Ill. 2003); *In re Freigo*, 149 B.R. 224, 284 (Bankr. M.D. Fla. 1992); *In re Conti*, 42 B.R. 122, 128 (Bankr. E.D. Va. 1984); *Matter of Gray*, 41 B.R. 759, 763 (Bankr. S.D. Ohio 1984); *In re Newlin*, 29 B.R. 781, 787 (Bankr. E.D. Pa. 1983).

[4] *Accord* 2B Hon. Joe Lee, *Bankruptcy Service* § 19:1480 (Lawyers ed. 2010); Arnold M. Quittner, *Employment and Compensation of Professionals*, § X(C) (PLI/Commercial Law and Practice Course, Handbook Series No. 5989 2005).

Aaron, *Bankruptcy Law Fundamentals* § 5.05 at 5-38 to 5-40 (21st ed. 2000).

II. The Question Presented Is Important.

This Court has stressed "the importance of § 362(a) in preserving the debtor's estate." *Midlantic Nat'l Bank v. N.J. Dept. of Envtl. Prot.*, 474 U.S. 494, 503 (1986). Indeed, "[n]othing is more basic to bankruptcy law than the automatic stay and nothing is more important to fair case administration than enforcing stay violations." *In re Lehman Bros. Holdings, Inc.*, __ B.R. __, 2010 WL 1783395, at *8 (Bankr. S.D.N.Y. 2010).

By eliminating much of the economic incentive to redress stay violations, the decision below "weakens substantially the effectiveness of the automatic stay." *Bertuccio*, 2009 WL 3380605, at *7 n.7. If attorneys' fees are not recoverable for a damages action, debtors will be discouraged from seeking redress for stay violations because the cost of pursuing the damages remedy will frequently exceed the amount of damages already incurred. By undercutting debtors' ability to pursue the section 362(k) remedy, the decision below thus undercuts creditors' incentive to comply with the automatic stay. Moreover, even if a debtor were to prosecute a damages action under these circumstances, the costs and legal fees incurred would deplete the value of the estate, thereby further reducing the funds available for distribution to creditors. In this way, the decision below twists a provision intended to preserve the debtors' assets into a mechanism that reduces those assets, to the detriment of both debtors and creditors.

Bankruptcy practitioners and observers have already predicted that the Ninth Circuit's holding will have a significant practical impact on creditors, debtors, trus-

tees, and judges bound by Ninth Circuit precedent.[5] The decision will not only encourage stay violations and leave debtors and creditors unprotected, but will introduce significant uncertainty into the bankruptcy system. That uncertainty has the potential to result in "lengthy litigation" and to "divert the resources of [debtors], depriving all the creditors of a distribution that would otherwise be theirs." 1 National Bankruptcy Review Commission, *Final Report, Bankruptcy: The Next Twenty Years* 708 (1997). That result is contrary to the goals of the automatic stay and the Ninth Circuit's own reasoning.

In the current economic climate, the number of bankruptcy filings has risen substantially. In 2009, there were 1.4 million bankruptcy filings—a 32 percent increase over 2008.[6] The limited data available for 2010 suggests that the rate of bankruptcy filings will continue on this upward trajectory.[7] And in the nine states within the Ninth Circuit, there was a 70 percent increase in bankruptcy filings from 2007 to 2008, driven in part by "the

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[5] *See, e.g.* Barry Glaser, *Understanding the Instant Impact of Steinberg v. Johnston on Attorney Fee Awards for Pursuing Willful Stay Violations in Bankruptcy Cases*, http://www.execsense.com/details.asp?id=553; Andrew Jurs, *Sternberg v Johnston: 9th Circuit Creates Circuit Split On Attorney Fees*, https://www.lexisnexis.com/Community/LitigationResourceCenter/blogs/litigationcommentary/archive/2010/01/12/Sternberg-v.-Johnston_3A00_--9th-Circuit-Creates-Circuit-Split-On-Attorney-Fees.aspx.

[6] National Bankruptcy Research Center, *December 2009 Bankruptcy Filings Report*, http://www.nbkrc.com/December2009_News.aspx (bankruptcy filings in first quarter of 2010 increased 18 percent over same quarter in 2009).

[7] National Bankruptcy Research Center, *March 2010 Bankruptcy Filings Report*, http://www.nbkrc.com/March2010_News.aspx.

sub-prime mortgage crisis and rising unemployment" that has particularly affected regions in California, Arizona, and Nevada within the Ninth Circuit's jurisdiction.[8] Given the rise in bankruptcy filings and the many creditors dependent on debtor estates, the question presented is a matter of critical importance to the bankruptcy system, and thus worthy of review by this Court.

III. The Ninth Circuit's Decision Is Wrong.

Certiorari is also warranted because the Ninth Circuit's analysis of the attorney-fee issue is wrong. ***First***, the Ninth Circuit misread the plain language of section 362(k)(1), which mandates an award of "actual damages, including costs and attorneys' fees" where the bankruptcy estate is injured by a willful violation of the automatic stay. *See* 2B Hon. Joe Lee, *Bankr. Service* § 19:1449 (Lawyers' ed. 2010). The Ninth Circuit correctly acknowledged that the term "actual damages" encompasses those losses that "result[] from the stay violation itself." Pet. App. 20. But the court, purporting to rely on the American Rule, adopted a "narrower understanding" of "actual damages" as including only those damages incurred while the stay violation is ongoing, excluding losses resulting from the violation but incurred "once the violation has ended." *Id.* That temporal limitation finds no support in the statute's plain language or in this Court's cases discussing the American Rule.

As the Court has explained, "the American Rule presumes that the word 'damages' means damages exclusive of fees." *Summit Valley Indus., Inc. v. Local 112, United*

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[8] Office of the Circuit Executive, *Ninth Circuit: United States Courts 2008 Annual Report* 49, http://www.ce9.uscourts.gov/publications/AnnualReport2008.pdf.

Brotherhood of Carpenters and Joiners of Am., 456 U.S. 717, 722-23 (1982). Thus, when a statute expressly includes attorneys' fees as recoverable damages, "Congress intend[s] to give a broader than normal scope to the term 'damages.'" *Id.* at 723. Accordingly, the phrase "including costs and attorneys fees" in section 362(k)(1) broadens the scope of the term "damages" to include costs and fees. *Walsh*, 219 B.R. at 879 (Ryan, J., concurring); *see also Roman*, 283 B.R. at 10 (holding that attorneys' fees under section 362(k) are "'actual damages,' rather than a separate litigation expense") (citing Dan B. Dobbs, *Law of Remedies* § 3.10(3) and (4), 285-86 (2d ed. 1993)).

To give effect to that broader meaning of "damages," section 362(k) must be read to mandate the recovery of attorneys' fees that "result[] from the stay violation," Pet. App. 20, regardless of whether they are incurred before or after the violation itself has ended. The statute ties the availability of damages to their cause—the stay violation—not to the time at which the damages are incurred.

Second, the Ninth Circuit's narrow construction of "actual damages" relies on the mistaken premise that a damages action is a discretionary action abused by litigious debtors to "pursu[e] [their] creditors" after the harm from the stay violation has ceased. Pet. App. 21-23. Based on that premise, the Ninth Circuit characterized the damages action as "litigation attenuated from the actual bankruptcy, something we do not think Congress intended to promote." *Id.* at 22. In fact, "the automatic stay also provides creditor protection. Without it, [creditors] who acted first would obtain payment of the claims in preference to and to the detriment of other creditors." *Ass'n of St. Croix Condo. Owners v. St. Croix Hotel*

Corp., 682 F.2d 446, 448 (3d Cir. 1982). The stay prevents the "estate from being eaten away ... before the trustee has had a chance to marshall the estate's assets and distribute them equitably among the creditors." *Mar. Elec. Co., Inc. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991) (citation omitted).

Just as the automatic stay protects the assets of the bankruptcy estate, section 362(k) works, in turn, "to protect the rights conferred by the automatic stay." *Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 880 (7th Cir. 2001). The provision accomplishes this end by conferring on innocent creditors and debtors a right to be "made whole," 3 Alba Conte, *Attorney Fee Awards* § 22:3 n.73 (3d ed. 2010), and by mandating the award of "monetary relief necessary to restore [the estate] to the financial position [it] would have occupied" but for a stay violation. *Aiello*, 239 F.3d at 880.

Until the bankruptcy estate is "restore[d] ... to the status quo" following a stay violation, the injury to the estate and its creditor beneficiaries persists. *In re Schriver*, 46 B.R. 626, 630-31 (Bankr. N.D. Ohio 1985). Section 362(k) provides a means of curing the injury and remedying the effects of the stay violation. The action is thus central to, not "attenuated" from, the "actual bankruptcy." Pet. App. 22.

In addition, by forcing "the debtor to resort to the courts to enforce his rights," *Schriver*, 46 B.R. at 630-31, the violator has forced the estate to incur the costs associated with recovery.[9] As such, the Fifth and Seventh Circuits have held that the recovery action is a "compul-

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[9] *Accord Will*, 303 B.R. at 367; *In re Lile*, 103 B.R. 830 (Bankr. S.D. Tex. 1989); *Conti*, 42 B.R. at 128.

sory counterclaim" to a stay violation because, absent the creditor's proscribed activity, "there would have been no need to expend the attorneys' fees and costs" in pursuit of damages. *Price*, 42 F.3d at 1073; *accord In re Lile*, 161 B.R. 788, 791 (S.D. Tex. 1993), *aff'd*, 43 F.3d 668 (5th Cir. 1994). Because the fees in a damages action "result[] from the stay violation itself," Pet. App. 20, they are recoverable as "actual damages" under the meaning of section 362(k).

Third, the Ninth Circuit's interpretation of section 362(k) is informed by a flawed policy analysis that ignores an animating purpose of the automatic stay—creditor protection. The Ninth Circuit understood the automatic stay to have a "twofold purpose" encompassing both "financial and non-financial goals." Pet. App. 21. In the court's conception, the stay's "financial" goal is to "give[] the debtor time to put his finances back in order" for the benefit of the creditors; its "non-financial" goal is to offer the debtor a "breathing spell" from litigation. *Id.* at 22. Because allowing the recovery of fees incurred in a damages action would further neither of these objectives, the Ninth Circuit reasoned, Congress would not have intended such fees to constitute "actual damages" under the meaning of section 362(k). *Id.* at 20-21.

The court below failed to recognize, however, that "[t]he automatic stay is primarily for the protection of the unsecured creditors as a group." *Aiello*, 239 F.3d at 879. Like the bankruptcy process itself, the stay serves twin goals of efficiency and fairness: "[w]ithout it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors." H.R. Rep. 95-595, at 340. Thus, the automatic stay is designed to (1) maximize

creditors' recovery by preserving the debtor estate for their benefit and (2) ensure that similarly situated creditors have equal opportunity to recover on their claims.

Unreimbursed financial losses (including attorneys' fees) that result from a stay violation "place the burden on the bankruptcy estate to absorb the expense." *Sharon*, 234 B.R. at 685-86 (citation omitted). The recovery of losses guaranteed by section 362(k) thus furthers the objectives of the automatic stay by holding the estate harmless for the violation, to maximize the recovery of unsecured creditors. In addition, section 362(k) ensures that a willful violation of the stay does not unfairly disadvantage innocent creditors.

As a practical matter, the Ninth Circuit's interpretation of section 362(k) may thwart creditors' and debtors' ability to recover losses at all. If attorneys' fees are unavailable, a debtor or bankruptcy trustee (with fiduciary obligations to the creditors) might be precluded from bringing suit where the costs of prosecution exceed the injury already incurred. In effect, the availability of the remedy is put in the hands of the violator: A creditor who, through "protracted litigation," "caus[es] the [debtor] to expend much more work," may avoid liability entirely by rendering the recovery action financially untenable. *In re Price*, 143 B.R. 190, 197 (Bankr. N.D. Ill. 1992).

The animating creditor-protective function of the automatic stay counsels against a reading that diminishes innocent creditors' recovery where a willful violator inflicts injury or forces a debtor estate to incur expense through additional litigation. The best reading of section 362(k), and the one most faithful to the goals of the Bankruptcy Code as a whole, is one in which "actual damages" include *all* reasonable attorneys' fees resulting

from the violation, including those incurred to secure the monetary recovery guaranteed by the provision.

CONCLUSION

If the petition for a writ of certiorari in No. 09-1374 is granted, this cross-petition should also be granted.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
ADINA H. ROSENBAUM
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
Washington, DC 20009
(202) 588-1000
dgupta@citizen.org

RONALD J. ELLETT
ELLETT LAW OFFICES
2999 N. 44th Street
Phoenix, AZ 85018
(602) 235-9510

Counsel for Cross-Petitioner

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